17230

Supreme Court of the United States.

OCTOBER TERM, 1903.

STATE OF MISSOURI, AT THE RELATION OF WILLIAM PRESTON HILL,
Plaintiff in Error,

vs.

ALEXANDER M. DOCKERY, SAM B. COOK, R. P. WILLIAMS, ALBERT O. ALLEN, EDWARD C. CROW, AND STATE BOARD OF EQUALIZATION,
Defendants in Error.

No. 180.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

William Preston Hill, relator, filed in the Clerk's office thereof on the 29th day of September, 1902, and presented to Hon. Waltour M. Robinson, one of the judges of the Supreme Court of the State of Missouri, a petition for a mandamus against the defendants in error (Record pp. 3 and 4), and thereupon, as provided

by statute, during the vacation of said Court, and on said day, said Judge issued an alternative writ of mandamus directed to them, returnable to the succeeding regular October Term of said Court in banc (Record, p. 8).

Said petition alleged in substance (and the alternative writ of mandamus contained such allegations entire), that said Hill was a citizen of and resident in said State and the City of St. Louis therein, and a tax payer in said City. That prior to and on the first day of June, 1901, he owned and still owns real and personal property situate in said City of the actual cash value of $104,070.00, which had been and still was assessed for taxation for State, City and School purpose by the Board of Assessors for said City, for the year 1902, at said full cash value, on which said property he had theretofore paid and the same was then liable for a tax in the sum of $2,026.39, for the latter year.

That defendants in error constituted the State Board of Equalization of said State, at all times therein mentioned, and that they met, organized and qualified on the third Monday in April, 1902, and took an oath to support the Constitution of the United States and the State of Missouri, and that they would to the best of their knowledge and ability faithfully and impartially assess, adjust and equalize the aggregate valuation of the various corporations liable to taxation in the State of Missouri, for taxes for the year 1902, and organized by the election of a president and vice-president, and that defendant in error, Albert O. Allen, entered upon the duties of secretary, and said Board entered upon the discharge of its duties as such, whereupon said Secretary presented to said Board, a communication from the Auditor of said

State, laying before it the returns made to his office by the President or other chief officer of the various corporations liable to taxation in said State, and the certificates made by the County Clerks relating thereto.

That on said first day of June, 1901, certain named corporations were, and still are, companies respectively owning and operating Railroads, Street Railroads, Bridges, Telegraphs, Telephones, and doing Express business in, and that each of them then had a chief office and place of business, and owned property both tangible and intangible, consisting of personal property and franchises, in said City and State, and that all of said property was subject to taxation in said City and State and assessable for said purpose by said Board only. That the aggregate total cash value of such property of each of them, separately set out, was such as to make the aggregate amount which should have been assessed to them and apportioned to said City of St. Louis, to have been of the total cash value of said Railroad Companies (eleven in number) the sum of $23,700,697.25. Of said Street Railroad Companies (four) the sum of $58,294,-066.42. Of said Bridge Companies (two) the sum of $6,900,000.00. Of said Telephone Companies (two) the sum of $4,719,404.16. Of said Telegraph Companies (two) the sum of $605,125.38. And of said Express Companies (four) the sum of $33,782 (making an aggregate total cash valuation of $94,253,075.21).

That it became and was the duty of said Board to fix, determine and assess the total actual cash value of said property of each of said corporations, and apportion the aggregate of the same of each of them to the Counties and the said City of St. Louis for the purpose of taxation. That said Board held sessions from time to time

until August 26, 1902, when an order of adjournment sine die was made.

That said Hill appeared before said Board during said sessions and demanded that they perform said duty, but they utterly failed and refused to do so as to any or all of said corporations, but unmindful of said duty, knowingly and wilfully made pretended assessments of the same, grossly inadequate, fraudulent and not uniform on the same classes of property of said respective corporations, in this, that said pretended assessments of said property of each of said railroad companies was made at one-fourth of said total actual cash value; each of said street railroad companies at 29 per cent thereof excepting on one made at 48 per cent; each of said bridge companies at less than one-third thereof; each of said telegraph companies at 43 per cent thereof; each of said telephone companies at one-third thereof, and made no assessment of any of the property of said express companies.

That said Board kept a record of its proceedings, including said pretended assessments, signed it officially, and on its adjournment filed the same in the Auditor's office who certified it to the County Courts and Municipal Assembly of said City, and upon which the tax levy for State, City and School purposes for the year 1902, would be made unless the Court granted relief by mandamus, by means whereof the taxes on said property of said Hill, and all other tax payers of said City, excepting said corporations, would be largely increased, to their great damage and injury, and said Hill be deprived of his property without due process of law, and denied the equal protection of the law, contrary to the pro-

visions of Section 1, Article XIV, of the Amendments to the Constitution of the United States.

That petitioner was without remedy through the ordinary process of law, and prayed the Court to award against respondents a writ of mandamus commanding them and it to forthwith meet and value and assess the total cash value of said property of each of said corporations and companies so assessable by them.

On the return day of said alternative writ, the defendants in error filed a motion to quash the same, which is in the nature of a demurrer to said writ and petition, based on the grounds that the Court had no jurisdiction of the subject matter of the writ and petition, or of the persons of defendants, in the proceeding, and that the writ and petition were insufficient in law to entitle the relator to relief, and the matters stated did not constitute any cause of action against them, or either of them (Record, p. 13).

The Court took up said motion to quash, and on November 10, 1902, made an order sustaining said motion, quashed said alternative writ and rendered a final judgment against the plaintiff in error, but did not file an opinion (Record, p. 13).

December 10, 1902, a writ of error was sued out in this cause, from this Court to the Supreme Court of the State of Missouri, and a citation issued and service thereof acknowledged the same day, which writ of error was duly returned by the Clerk of the latter Court, the case docketed and the record filed with the Clerk of this Court, December 30, 1902 (Record pp. 1, 2, 17).

The errors assigned herein are as follows:

1. The Court erred in said cause in sustaining the motion to quash the alternative writ of mandamus issued therein, filed therein by defendants in error, and in quashing said alternative writ of mandamus, and in rendering judgment therein in favor of defendants in error, respondents in said cause.

2. The Court erred in said cause in not overruling the motion to quash the alternative writ of mandamus issued therein, filed therein by defendants in error, respondents in said cause.

3. The Court erred in said cause in rendering judgment therein in favor of the defendants in error, respondents in said cause, and denying to plaintiff in error any relief from the wrong and injury complained of in the petition for and the alternative writ of mandamus issued therein on said petition.

4. The Court erred in said cause in not rendering judgment therein in favor of plaintiff in error, and in not granting to plaintiff in error relief from the wrong and injury complained of in the petition for and the alternative writ of mandamus issued therein on said petition (Record, p. 16).

Wherefore, the said plaintiff in error prays the Honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of the State of Missouri entered in the above entitled cause.

The Constitution of the State of Missouri provides as follows:

ARTICLE X.

SEC. 2. Power to Tax Corporations Not to be Surrendered.—The power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly.

SEC. 3. Taxes for Public Purposes Must be Uniform.—Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

SEC. 4. Taxes in Proportion to Value.—All property subject to taxation shall be taxed in proportion to its value.

SEC. 5. Railway Corporations, Taxed for What Purpose.—All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock.

SEC. 18. State Board of Equalization—Members.—There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney-General. The duty of said Board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law.

Sec. 1, Laws of Mo., 1901, p. 232, requires the assessment of the franchises of all corporations and companies of the character named in the petition and writ herein, "for the purposes of taxation, at the same time and in the same manner as other property of such corporations," and Section 2 thereof requires the State Board of Equalization to ascertain, fix and determine the total value for taxable purposes of the entire property of such corporations in this State, assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list under the head of "all other property."

Sec. 9144, Revised Statutes of Mo., 1899, requires property to be assessed at its value on the first day of June, 1893, and every year thereafter. Sec. 9186, Id., makes every person owning or holding property on said day, liable for taxes thereon for the ensuing year, and Sec. 9180, Id., provides:

SEC. 9180. Valuation to be Placed on Property and Order of Arrangement.—The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation. * * *

SEC. 9126, Id. Time of Meeting—Duties of Secretary.—The Board shall meet at the capitol in the City of Jefferson on the last Wednesday in February, and every year thereafter, the majority of whom shall constitute a quorum, and the members thereof shall each take an oath or affirmation that he will, to the best of his knowledge and ability, equalize the valuation of real

and personal property among the several counties in the State, according to the rules prescribed by this chapter for equalizing and valuing real property; and the secretary of the Board shall keep an accurate account of all their proceedings and orders, and file the same together with all their papers, in the office of the State Auditor.

SEC. 9344, Id. State Board of Equalization, How Composed—Duties.—The State Board for the assessment and equalization of railroad property shall be composed of the Governor, Secretary of State, State Auditor, State Treasurer and Attorney-General, and shall meet annually at the capitol, in the City of Jefferson, on the third Monday of April of each year, for the purpose of assessing, adjusting and equalizing the valuation of such railroad property. The said Board shall proceed to assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this State specified in Section 9339. The Board shall have power to summon witnesses by process issued to any officer authorized to serve subpœnas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other property belonging to said railroad companies, or property belonging to any railroad companies in this State of the kind specified in Section 9339, upon which no returns have been made, which may be other-

wise known to them, as they deem just and right. In assessing, adjusting and equalizing any railroad property for any year or years, the State Board may arrive at its findings, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the Board may think it is entitled to: *Provided*, that when any railroad shall extend beyond the limits of this State and into another State in which a tax is levied and paid on the rolling stock of such road, then the said Board shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this State bears to the total length of the road as owned or controlled by such company.

Sec. 10383, Id., provides that the State Auditor "shall also be secretary of the State Board of Equalization, and shall cause all of the clerical work of said Board to be performed by the clerks in his office."

Sec. 9338, Id., provides that all railroads constructed, in course of construction or hereafter constructed in this State, and all other property, real, personal or mixed, owned, hired or leased by any railroad company or corporation in this State, shall be subject to taxation for State, county or other municipal purposes.

Sec. 9339, Id., provides that on or before the first day of January of each year, the president or other chief officer of every railroad company, whose road is completed so far as to run engines and cars, to make a verified statement to the Auditor, setting out in detail the

length of its road in the State, other property owned by it, with number of engines, cars, etc., owned by it on the first day of June of each year, "and the actual cash value thereof."

Sec. 9345, requires the president or other chief officer of other companies and individuals owning cars, etc., to make to the Auditor a verified statement on or before the first day of January in each year, specifying the number of cars and other railroad equipments owned, and the number of miles traveled in this State during the year next preceding the first day of June.

Sec. 9346, requires the president or other chief officer of every railroad company whose lines run into or through this State, to make a verified statement to the State Auditor similar to the latter.

Sec. 9340, Id., requires a duplicate statement of the one required by Section 9339, to be furnished to the Clerk of the County Court of each county, and of their property in each county.

Sec. 9341, Id., provides that the clerk shall, at the next term lay such statement before the county court, and prescribes the duty of the county court in ascertaining the correctness of such statement and of fixing the value of such property, and requires the court to forward an official statement of what they believe to be the actual cash value of such property, to the State Auditor on or before the first day of the next April.

Secs. 9343 and 9347, Id., require the State Auditor, on the third Monday of April, in each year, to lay before the State Board of Assessment and Equalization, all of said returns made to him.

Sec. 9342, Id., provides that if any railroad company fails to make return as required, the Board shall ascertain the property of such company "from the best information they can obtain," and fix the value thereof, and file their action thereon in the office of the State Auditor.

Secs. 9353 and 9355, Id., provide for verified statements from the chief officer of, and the assessment by the State Board of Equalization, of the property of street railroad companies.

Sec. 9387 as amended, Laws Mo., 1901, p. 223, provides for the assessment by said Board of the property of telegraph, telephone and express companies.

Sec. 9348, Id., requires the State Board of Equalization to ascertain from said statements, the number of cars required to make the total mileage of the cars of each company or individual within the period of one year, and ascertain and fix a valuation on each class of such cars, and assess the same to the respective companies and individuals and "such assessment shall be included in the record and proceedings of the Board, and shall be filed in the office of the State Auditor on its adjournment."

Sec. 9357, Id., requires said Board to apportion the aggregate value of the property so assessed by them to the different counties, municipal townships, cities and incorporated towns in the State, entitled thereto.

Sec. 9358, Id., requires said Board to keep a full record of all its proceedings and decisions, cause it to be signed officially by the president and secretary and file the same in the office of the State Auditor on its

adjournment, and further provides for printing and distributing same by the State Auditor.

Sec. 9359, Id., requires the State Auditor, on receipt of the proceedings of said Board, to certify to the county courts of the proper counties, the action of said Board, with the amount assessed and apportioned to such county, city, town, village and municipal township therein by said Board.

SEC. 9356, Id. An Omission to Assess, How Corrected.—The State Board of Assessment and Equalization shall have the power to assess, adjust and equalize the property hereinbefore specified of any railroad company, in whole or in part, for any year or years since March 10, 1871, for which it has been or for which it may hereafter be omitted from assessment, adjustment and equalization, and to reassess, adjust and equalize any such railroad property, in whole or in part, as the case may be, for any year or years for which it may have been heretofore or in which it may hereafter be assessed, adjusted and equalized, but which assessment, adjustment and equalization, for any cause has been or which may hereafter be held by the courts to be irregular or void.

Secs. 9176 and 9177, Id., contain similar provisions in regard to all other property.

No provision is made by the statutes of this State for the assessment of property in the City of St. Louis, other than such as is designated in the petition and writ herein, and such assessment is provided for in the City Charter, the city being one of the subdivisions of the State corresponding to a county, Section 4160, Id., and

Section 21, Article IX, of the State Constitution, requires all courts to take judicial notice of said charter.

Section 15, Article V, of said charter, R. S. Mo., 1899, p. 2503, provides for an assessment in the City of St. Louis in accordance with the general laws, by a board of assessors, and Section 27 thereof, p. 2506, requires the Municipal Assembly to fix by ordinance the percentage of taxes for the current year.

Sec. 9383, R. S. Mo., 1899, provides that (under the revenue law) all services required to be performed by county officers shall be performed by corresponding officers of the City of St. Louis, and wherever the word county occurs, the same shall be construed to extend to the City of St. Louis.

Sec. 2, p. 187, Laws Mo., 1877, is as follows:

SEC. 2. All acts and parts of acts which provide for the performance of any duty or trust by any county court in this State, shall also include the Municipal Assembly, and the Mayor and Comptroller of the City of St. Louis.

POINTS AND AUTHORITIES.

1. Section 3, Article VI, of the Constituton of this State, provides:

SEC. 3. Supreme Court, Superintending Control of.—The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same; State vs. Renick, 157 Mo., 292, 297.

2. Sec. 4301, R. S. Mo., 1899, authorizes, or rather recognizes, the authority of a judge of the Supreme Court of this State, to issue an alternative writ of mandamus, as was done by Judge Robinson in this case. State vs. Weeks, 93 Mo., 499, 501; State vs. Rombauer, 104 Mo., 619, 620, 627.

3. A writ of mandamus is properly issued whenever there is a clear legal right and no specific or direct legal remedy, or where the remedy is dilatory or uncertain. State vs. Fraker, 166 Mo., 130, 140; State vs. Renick, 157 Mo., 292, 298; State vs. St. Louis, 145 Mo., 551, 577; State vs. Joplin Water Works, 52 Mo., App., 312, 317-318; 19 Am. & Eng. Encyc. of Law, 2d Ed., 725, and cases cited.

4. Such writ is remedial in its nature. State vs. Lewis, 76 Mo., 370, 379-382; and it is treated as an ordinary writ of right issuable as of course, on proper cause

shown. State vs. Fraker, 166 Mo., 130, 140; High's Extraordinary Legal Remedies, 3d Ed., Sec. 430.

5. It may be addressed to a court or other body or the individuals composing either, or to both of them. St. Louis County vs. Sparks, 10 Mo., 117, 120; State vs. Public Schools, 134 Mo., 296, 297; State vs. School Board, 131 Mo., 505, 511; State Board of Equalization vs. The People, 191 Ill., 528.

6. The proper mode of testing the sufficiency of an alternative writ of mandamus is by a motion to quash such writ. State vs. Cook, 171 Mo., 348, 354; State vs. Everett, 52 Mo., 89, 93. But whether the mode adopted for that purpose be a motion to quash or a demurrer, all facts sufficiently pleaded are thereby admitted. State vs. Higgins, 76 Mo. App., 319, 328; State vs. Neville, 110 Mo., 345, 348; State vs. Public Schools, 134 Mo., 296, 305; State vs. Conrad, 147 Mo., 654, 662; State vs. Adams, 161 Mo., 349, 363.

7. The motion to quash the alternative writ in this case, is general in its nature, and if there is a cause of action stated in it ever so defectively, it should have been overruled by the Court below, as a demurrer, to which this motion to quash is equivalent, must distinctly specify the grounds of objection to the pleadings and defects not so specfied in it will not be noticed. Secs. 599 and 675 (the latter section extending the code practice to writs of mandamus), R. S. Mo., 1899; McClurg vs. Phillips, 49 Mo., 315, 316; Alnut vs. Leper, 48 Mo., 319, 321. And irrelevant or redundant matter in a pleading may be stricken out on motion. Sec. 612, R. S. Mo., 1899; State vs. St. Louis, 145 Mo., 551, 565.

8. The Governor of the State of Missouri, as such Governor, is not in any manner, even *ex-officio*, a party to this cause, and is a party hereto as a member of the State Board of Equalization only. State vs. Walker, 97 Mo., 162; State vs. Dent, 121 Mo., 162, 168. If, however, he were improperly joined, it would not have been necessary to render a judgment against him, as a judgment against said Board, or the other members thereof, a majority of whom constituted a quorum (R. S. Mo., 1899, Sec. 9126) would have been sufficient.

9. This is not a suit against the State of Missouri, but against its officers to compel them to exercise a discretion vested in them by its laws. Smyth vs. Ames, 169 U. S., 466, 518; Scott vs. Donald, 165 U. S., 58, 67; *In re* Tyler, 149 U. S., 164, 190; Tindal vs. Wesley, 167 U. S., 204, 220; Pennoyer vs. McConnaughy, 140 U. S., 1, 10.

10. A writ of error or an appeal lies from a judgment of an inferior court, awarding or refusing a peremptory writ of mandamus. State vs. Riley, 85 Mo., 156; State vs. Lewis, 76 Mo., 370, 377, 378; State vs. Horner, 10 Mo., App., 307, 315; Bastan vs. Board of Trustees, 88 Mo. App., 22, 24; *ex parte* Skaggs, 19 Mo., 339, 340; Lewis vs. Price, 11 Mo., 398; Merrell on Mandamus, Sec. 306. And a writ of error lies from this Court to the Supreme Court of Missouri, on a refusal by the latter to issue such writ. Missouri vs. Lewis, 101 U. S., 22.

11. Any citizen and taxpayer is entitled to bring an action in mandamus against a public officer to compel him to perform his official public duty. State vs. Public Schools, 134 Mo., 296; 304; State vs. School Board, 131

Mo., 505, 514; State vs. Francis, 95 Mo., 44, 48; State vs. Hoblitzelle, 85, Mo., 620, 626; State vs. Railroad, 86 Mo., 13, 16. And in such case it is not necessary that demand be made for such performance. State vs. Stuckey, 78 Mo. App., 533, 545; People vs. Kipley, 171 Ill., 44, 91; State Board of Equalization vs. People, 191 Ill., 528, 540; State vs. Street Ry. Co., 19 Wash., 518, 523; State vs. Cornwall, 97 Wis., 565, 568; 13 Encyc. of Pl. & Pr., 618; High's Ext. Leg. Rems., 3d Ed., Sec. 13; Merrill on Mandamus, Sec. 224.

12. Notwithstanding the adjournment of the Board, mandamus will lie to compel it to reassemble and perform the duty it should have, but failed, to perform. State vs. Berg, 76 Mo., 136, 143-146; State vs. Trigg, 72 Mo., 365; State vs. Public Schools, 134 Mo., 296, 304; State vs. Stucky, 78 Mo. App., 533, 545; Lowenthal vs. The People, 192 Ill., 222, 232; The People vs. Board of Supervisors, 185 Ill., 288, 292; People vs. Schiellien, 95 N. Y., 124, 133; People vs. Board of Registration, 17 Mich., 427; Lewis vs. Commissioners, 16 Kan., 102, 106-107; State vs. Hill, 20 Neb., 119, 120-123. There is no limit of time during their session within which respondents must have made the assessment, and the same could have been made, or altered if previously made, on the day of adjournment, and an application made before the latter day, would have been premature and properly refused. State vs. Associated Press, 159 Mo., 410, 421; Lowenthal vs. The People, 192 Ill., 222, 232-233; High's Ext. Leg. Rems., 3d Ed., Sec. 12. Besides the writ would not abate, but might go against their successors in office. State vs. Walbridge, 153 Mo., 194, 204; State Board of Equalization vs. The People, 191 Ill., 528, 541. Under the plenary provisions of Sec. 9356, R. S. Mo.,

1899, it would not be necessary to reconvene said Board, as it could be compelled to perform the omitted duties complained of herein, at any future session of the Board.

13. Mandamus does not lie to control the discretion of a court board or public officer, but to compel its exercise in cases where it was not exercised, or where it was exercised in such a manner as to amount to a virtual refusal to exercise it (State vs. Talty, 166 Mo., 529, 560), for instance, where the act complained of is capricious, oppressive or fraudulent. State vs. St. Louis, 158 Mo., 505, 514; State vs. Public Schools, 134 Mo., 296, 311; State vs. The State Board of Health, 103 Mo., 22, 29.

14. Mandamus lies to compel an officer to perform his duty, and levy a tax where he fails or refuses to perform it. State vs. Tracy, 94 Mo., 217, 219; State vs. Riley, 85 Mo., 156, 159; State vs. Byers, 67 Mo., 706. And also to compel a State Board of Equalization to assess property. State vs. Severance, 55 Mo., 378, 384, 387, 388; State Board of Equalization vs. People, 191 Ill., 528, 531-532; Merrill on Mandamus, Sec. 527, and cases cited. And see Brown vs. Oneida County, 103 Wis., 149, 159.

15. An assessment of property made by a State Board of Equalization, that is grossly inadequate and willfully and knowingly so made, as the one under consideration is charged to be, is fraudulent and such Board may be compelled by mandamus to make a valid assessment. State Board of Equalization vs. The People, 191 Ill., 528, 539, 540; State vs. Savage (Neb., not yet officially reported), 91 N. W. Rep., 716, 718-719, 731; Manchester vs. Furnald, 71 N. H., 153, 158; Knight vs.

Thomas, 93 Me., 494, 500; Brown vs. Oneida County, 103 Wis., 149, 159; Pittsburgh, etc., Railway Co. vs. Backus, 154 U. S., 421, 435; Taylor vs. Louisville & N. R. Co., 88 Fed. Rep., 350, 373-374.

16. The averments in the petition and alternative writ herein, that respondents failed and refused to perform said duty of ascertaining, fixing, determining and assessing the total cash value of said property, or of all or any of said corporations, and companies so assessable by them, but unmindful of said duty, knowingly and willfully made pretended assessments of the same, grossly inadequate, fraudulent and not uniform upon the same class of property of said respective corporations and companies, setting out assessments ranging from twenty-five to forty-eight per cent of the cash value of the property so assessed, as against an assessment of the full cash value of the property of relator, and alleged to be a gross abuse of their discretion and an evasion of their positive duty, thereby largely increasing the tax to be paid by him and all other taxpayers of said City of St. Louis, to their great damage and injury, brings the case at bar within the rulings of this Court denying to persons the equal protection of the laws. Cummings vs. National Bank, 101 U. S., 153, 157-158, 161; Supervisors vs. Stanley, 105 U. S., 305, 318; National Bank vs. Kimball, 103 U. S., 732, 735; Pittsburgh, etc., Ry. Co. vs. Backus, 154 U. S., 421, 435; Kentucky Railroad Tax Cases, 115 U. S., 321, 336; Union Pac. Ry. Co. vs. Cheyenne, 113 U. S., 517, 526; Stanley vs. Supervisors of Albany, 121 U. S., 535, 548; Taylor vs. Louisville & Nashville Rd. Co., 60 U. S. App., 166, 201-208; Phila. Fire Ass. vs. New York, 119 U. S., 110, 120-121; New York State vs. Barker, 179 U. S., 279, 284, 286.

ARGUMENT.

The petition and alternative writ in this case, state in detail all of the facts required under the authorities, to constitute a cause of action entitling relator to the relief asked, and in addition thereto, a demand by him of respondents, while in session, for such relief.

The motion to quash filed by respondents in this case, raises no formal or technical objections to either the petition for, or the alternative writ of mandamus issued herein, which it must have done, in order to have entitled respondents to any benefit thereof if such objections had existed. The substance of said motion to quash is: 1. That there is no cause of action stated in the writ, not one stated informally, defectively or insufficiently, but none at all. 2. That the Court had no jurisdiction of the subject matter of said writ, or of the defendants therein in the capacity in which they were sued. The first objection stated is based on and resolved into the second one, and the Court below so treated it by disregarding any informalities in the writ, if such there had been, and rendering a final judgment in favor of the defendants in error, on the merits of the case as presented.

It is thoroughly established law in the State of Missouri that the relator had a right merely as a citizen of the State, to maintain an action to compel a public officer of this State to perform a public duty, and this right is strengthened by the fact that he was also a taxpayer and had a personal interest in the subject matter

of the writ. In State vs. School Board, 131 Mo., 505, a case in mandamus to compel the Board to call an election of directors, the law on this subject is stated as follows, p. 514:

"2. The relators described themselves as "citizens, taxpayers and resident householders of the City of St. Louis," but it is insisted for defendants that private persons can not set on foot a proceeding of this nature without at least the sanction of the official representatives of the State or of the locality affected by the application.

"On this point the precedents in other jurisdictions are not in accord. It is needless to review them, for in Missouri several cases have dealt with this subject, and the conclusion has been reached that where a public right is involved and the object is to enforce a public duty, the people are regarded as the real moving party; and, in such a case, the relator in mandamus need not show any special or peculiar interest in the result, if the performance of the general public duty obviously affects his rights as a citizen. State ex rel. vs. Railroad (1885), 86 Mo., 13; State ex rel. vs. Francis (1888) 95 Mo., 44 (8 S. W. Rep. 1).

"We see no reason to depart from that rule, nor do we see anything in the case at bar that prevents its application.

"The relators have the right as citizens of the locality to representation in the School Board by members chosen in conformity to the law on the subject. We regard their interest as sufficient to sustain their position as relators under the rulings above cited."

It is equally thoroughly established in Missouri, in accordance with the declaration in its constitution of the proposition, that a mandamus is a remedial writ, and it is issuable as of course, upon proper cause shown. In State vs. Fraker, 166 Mo., 130, the law is stated in the following terms on pp. 140-141:

"We find no difficulty in treating the petition (regarding it as the alternative writ), as stating those things which authorized the rendition of the judgment rendered, and the issuance of the pre-emptory writ. Ever since Platte Co., Ct., vs. McFarland, 12 Mo., 166, mandamus has been regarded as the proper proceeding to compel a recalcitrant county court to do its duty. (See also, Riley vs. City, 31 Mo. App., 439.) Besides, the writ of mandamus is, in modern practice, treated as an ordinary writ of right, issuable as of course, upon proper cause shown. (High Extr. Leg. Rem. (3 Ed.), Sec. 430.)"

And the State Board of Equalization may be proceeded against for a failure to perform its duty. In State vs. Severance, 55 Mo., 378, a case in mandamus to reduce an excessive assessment, occurs the following on pp. 387-388:

"There is no attempt here to tax one section for the benefit of another, nor is any real inequality produced. The Board apportions and sets off the value of all real estate to the counties, cities or incorporated towns in which it is situated, and they collect what is due to them upon the same. Thus there is no exemption and no inequality. Should the Board (State Board of Equalization) omit to assess any property or place too low an estimate upon it, the proper proceedings should be

taken by those interested to have the error or mistake rectified. * * * As such Board they are amenable to the same supervision as other boards performing similar duties."

It is further conceded to be the settled law of Missouri that its Governor, in his official capacity as Governor, is not subject to mandamus to compel him to perform any of his duties, not even a purely ministerial one.

In the case of State vs. Walker, 97 Mo., 162, a proceeding in mandamus against the State Auditor to compel payment to the Secretary of State for services rendered as a member of the State Board of Equalization, Mr. Justice Sherwood, after having quoted the section allowing such compensation, and also the section constituting him, the Governor and other State officers, such Board, proceeds as follows on p. 163:

"It will thus be seen from the provisions of the Constitution just noted, that the State officers mentioned in Section 24, *supra,* are not *ex-officio* members of the State Board of Equalization; that is, their membership of that Board is not the result of their holding certain State offices, but is the result of their appointment to the Board, by an independent and distinct provision of the Constitution. 1 Burrill Law Dict., title *ex-officio.* But for such independent provision they would not have been members of such Board."

This is not a suit against the State of Missouri, but one against its officers to compel them to exercise a discretion vested in them by its laws. In Board of Liquidation *et al.* vs. McComb, 92 U. S., 531, this question is settled in the following language on p. 541:

"The objections to proceeding against State officers by *mandamus* or injunction are: First, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with official discretion vested in its officers. It is conceded that neither of these things can be done. A State, without its consent, can not be sued by an individual; and a court can not substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation can not be had at law, may have an injunction to prevent it. In such cases, the writ of *mandamus* and injunction are somewhat correlative to each other."

It is too plain to admit of argument, that compelling the respondents to exercise their discretion or judgment, honestly and fairly, in the matter under consideration, the failure and refusal to exercise which has injured the relator, would not in any manner interfere with the exercise of that discretion or judgment.

It results from the foregoing, that the judgment of the Court below, was and is clearly a refusal to allow the relator to sue in the courts of the State to enforce a legal right, as much so as if it had rendered a judgment precluding him from maintaining an action on a promissory note drawn in his favor by the defendant, provided that the subject of the petition and writ fur-

nished a cause of action, to which latter proposition we shall now turn our attention.

We readily concede that the defendants in error had a discretion to exercise in the valuation of the property specified, for assessment, and that their judgment on the subject was necessarily required to have been exercised, and that their discretion and judgment, if they had been honestly and fairly exercised, could not have been disturbed by the court, even if erroneous or unjust. It is only when their conclusions in regard to valuations are actually fraudulent, or so grossly inadequate as to render them fraudulent, as charged in this case, that they are void, and that the Court could have interposed and required them to have made an honest and fair assessment.

In this case, as in the case of State Board of Equalization vs. People, 191 Ill., 528, a proceeding in mandamus to compel said Board to assess the property of certain corporations in Chicago, and the leading case on this subject, and in which the relief asked for was granted, the respondents acted as an original assessor and not as a board of review. In the latter case the opinion contains the following, on pp. 537 and 538:

"We have repeatedly held that an assessment may be impeached on the ground that property has been assessed at too high a rate. In Pacific Hotel Co. vs. Lieb, 83 Ill., 602, we say (p. 609): 'Where the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of a fraud upon his part, against the taxpayer, and the Court will interpose.' And in Chicago,

Burlington and Quincy Railroad Co. vs. Cole, 75 Ill., 591 (on p. 594): 'Valuations must be the result of honest judgment, and not of mere will.' The converse of the proposition must be true, and an assessment may be impeached where the assessment has been fraudulently made at too low a rate."

The Court affirmed a judgment granting the relief, and like rulings have been made in the similar and recent cases of State vs. Savage, Neb., 91 N. W. Rep., 716; Manchester vs. Furnald, 71 N. H., 153; Knight vs. Thomas, 93 Me., 494, but the relief sought was refused in each of the latter cases, on other grounds. In the two former cases, the one cited from 191 Ill., 528, is quoted with approval on p. 731, 91 N. W. Rep., and on p. 158, 71 N. H.

The petition and writ in the case at bar, not only charge a willful fraud knowingly committed by respondends, but states in detail the undervaluations of property made by them, from which fraud would be legally inferred.

Aside from the provisions of Section 9356, R. S. Mo., 1899, it will be seen from the authorities cited to point 12 herein, that the respondents may be reconvened for the purpose of making an honest and fair assessment of the property designated in the petition and writ herein, but said section is so specific and plenary in regard to this subject, that it would seem to be unnecessary to reconvene them for that purpose, and a direction to them to do so at their next regular session would be sufficient.

It necessarily follows that as relator had a cause of action, that the judgment of the Court below deprived

him of it, and that such judgment deprived him of the equal protection of the law.

There is, however, another ground on which the judgment of the Court below deprived him of the equal protection of the law, which has been repeatedly recognized by this Court, excepting that this case, like the Illinois case, presents the converse of the proposition, which likewise must be true. It is that where assessors combine together and by agreement assess the property of an individual at a much higher rate than they assess the property of other individuals, and this discrimination extends to the whole State or a large district in it, that the individuals against whom the higher rate is assessed, are deprived of the equal protection of the law. In other words, such an assessment is fraudulent, and the latter is the ground on which the cases referred to are based.

In the case at bar there was but one assessor, the respondents in this case, composing the State Board of Equalization, so that there could be no combination, but the gist of the offense, fraud, could be committed, and is charged to have been committed by them, and the facts constituting it are set forth. The fraudulent assessment in its effect, is not confined to the City of St. Louis, but necessarily extends to the whole State, and is alleged to affect injuriously, not only relator, but every other taxpayer, except the corporations specified, of the City of St. Louis, a large district of itself.

In Philadelphia Fire Association vs. New York, 119 U. S., in a dissenting opinion of Mr. Justice Harlan, occurs the following on pp. 120-121:

"The denial of the equal protection of the laws may occur in various ways. It will most often occur in the

enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community."

And in Cummings vs. National Bank, 101 U. S., 153, Mr. Justice Miller, in delivering the opinion of the Court, says on pp. 157 and 158:

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given."

It is sufficient to say on this subject, that this Court has steadily adhered to the principle set forth in the foregoing extracts.

In conclusion, relator does not seek to be relieved from an excessive assessment. He does not claim that such an assessment has been made against his property, unless the ones complained of are permitted to stand. He seeks redress by compelling the respondents to make an honest and fair assessment of the property of the corporations named in the petition and writ herein, and thereby relieve him and all other taxpayers of the City of St. Louis, from an unjust and illegal burden. There is no other remedy known to the law, excepting the one

he has invoked, with which to accomplish this object. That remedy was denied to him by the judgment of the Court below, and he therefore, asks that said judgment be reversed, and the cause remanded, and the Court below required to proceed accordingly.

All of which is respectfully submitted.

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